

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JESSICA BIXLER,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security
Administration,

Defendant.

NO: 12-CV-3045-TOR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment (ECF Nos. 16, 20). Plaintiff is represented by D. James Tree. Defendant is represented by Jeffrey R. McClain. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the Court grants Defendant's motion and denies Plaintiff's motion.

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JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is limited: the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id.*, at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether this standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district

1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
2 *Id.* at 1111. An error is harmless “where it is inconsequential to the [ALJ’s]
3 ultimate nondisability determination.” *Id.* at 1115 (quotation and citation omitted).
4 The party appealing the ALJ’s decision generally bears the burden of establishing
5 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

6 **FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered “disabled” within
8 the meaning of the Social Security Act. First, the claimant must be “unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
13 “of such severity that he is not only unable to do his previous work[,] but cannot,
14 considering his age, education, and work experience, engage in any other kind of
15 substantial gainful work which exists in the national economy.” 42 U.S.C.
16 § 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R.
19 § 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s
20 work activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in

1 “substantial gainful activity,” the Commissioner must find that the claimant is not
2 disabled. 20 C.F.R. § 416.920(b).

3 If the claimant is not engaged in substantial gainful activities, the analysis
4 proceeds to step two. At this step, the Commissioner considers the severity of the
5 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
6 “any impairment or combination of impairments which significantly limits [his or
7 her] physical or mental ability to do basic work activities,” the analysis proceeds to
8 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
9 this severity threshold, however, the Commissioner must find that the claimant is
10 not disabled. *Id.*

11 At step three, the Commissioner compares the claimant’s impairment to
12 several impairments recognized by the Commissioner to be so severe as to
13 preclude a person from engaging in substantial gainful activity. 20 C.F.R.
14 § 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
15 enumerated impairments, the Commissioner must find the claimant disabled and
16 award benefits. 20 C.F.R. § 416.920(d).

17 If the severity of the claimant’s impairment does meet or exceed the severity
18 of the enumerated impairments, the Commissioner must pause to assess the
19 claimant’s “residual functional capacity.” Residual functional capacity (“RFC”),
20 defined generally as the claimant’s ability to perform physical and mental work

1 activities on a sustained basis despite his or her limitations (20 C.F.R.
2 § 416.945(a)(1)), is relevant to both the fourth and fifth steps of the analysis.

3 At step four, the Commissioner considers whether, in view of the claimant's
4 RFC, the claimant is capable of performing work that he or she has performed in
5 the past ("past relevant work"). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
6 capable of performing past relevant work, the Commissioner must find that the
7 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
8 performing such work, the analysis proceeds to step five.

9 At step five, the Commissioner considers whether, in view of the claimant's
10 RFC, the claimant is capable of performing other work in the national economy.
11 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
12 must also consider vocational factors such as the claimant's age, education and
13 work experience. *Id.* If the claimant is capable of adjusting to other work, the
14 Commissioner must find that the claimant is not disabled. 20 C.F.R.
15 § 416.920(g)(1). If the claimant is not capable of adjusting to other work, the
16 analysis concludes with a finding that the claimant is disabled and is therefore
17 entitled to benefits. *Id.*

18 The claimant bears the burden of proof at steps one through four above.
19 *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). If
20 the analysis proceeds to step five, the burden shifts to the Commissioner to

1 establish that (1) the claimant is capable of performing other work; and (2) such
2 work “exists in significant numbers in the national economy.” 20 C.F.R.
3 § 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

4 **ALJ’S FINDINGS**

5 Plaintiff applied for supplemental security income (SSI) benefits on June 18,
6 2008, alleging an onset date of April 15, 2007. Tr. 108-10. Her claims were
7 denied initially and on reconsideration. Tr. 68-71, 77-79. Plaintiff appeared by
8 video at a hearing before an administrative law judge on August 3, 2010. Tr. 17;
9 37-65. The ALJ issued a decision on September 9, 2010, finding that Plaintiff was
10 not disabled under the Act. Tr. 17-27.

11 At step one, the ALJ found that Plaintiff had not engaged in substantial
12 gainful activity since June 18, 2008, the application date. Tr. 19. At step two, the
13 ALJ found that Plaintiff had severe impairments, but at step three the ALJ found
14 that Plaintiff did not have an impairment or combination of impairments that met
15 or equaled the listing of impairment. Tr. 19-22. The ALJ determined Plaintiff had
16 the RFC to:

17 perform a full range of work at all exertional levels but with the
18 following nonexertional limitations: the claimant is limited to
19 lower semi-skilled (SVP3) tasks that involve no more than superficial
20 contact with others.

Tr. 22. At step four, the ALJ found that Plaintiff had no past relevant work.

Tr. 26. At step five the ALJ found Plaintiff could perform other work

1 existing in significant numbers in the national economy in representative
2 occupations such as a sorter, cleaner 1, and mail clerk (all SVP2). Tr. 26.
3 Since the ALJ found that, considering Plaintiff's age, education, work
4 experience, and RFC, the Plaintiff is capable of making a successful
5 adjustment to other work that exists in significant numbers in the national
6 economy, a finding of not disabled was made. Tr. 27

7 On November 12, 2010, Plaintiff requested review by the Appeals
8 Council. Tr. 106. On February 10, 2012, the Appeals Council denied
9 Plaintiff's request for review, Tr. 1-5, making the ALJ's decision the
10 Commissioner's final decision that is subject to judicial review. 42 U.S.C.
11 §§ 405(g), 1383(c)(3); 20 C.F.R. §§ 416.1481, 422.210.

12 ISSUES

13 Plaintiff seeks judicial review of the Commissioner's final decision denying
14 her supplemental security income under Title XVI of the Social Security Act.
15 Plaintiff has identified four issues for review:

- 16 1. The ALJ committed reversible legal error by improperly weighing and
17 improperly rejecting Dr. Sean Mee Ph.D. and Diane Kramer VE.
- 18 2. The ALJ committed reversible legal error by improperly weighing and
19 rejecting Dr. Rodenberger?
- 20 3. The ALJ committed reversible legal error by improperly rejecting
"nonacceptable" medical sources.

1 4. The ALJ committed reversible legal error by improperly rejecting the lay
2 witness testimony of Lisa Bixler.

3 ECF No. 17 at 14.

4 **DISCUSSION**

5 **A. State Medical Consultant's Opinion**

6 Plaintiff contends the ALJ failed to include limitations from the check-box
7 portion of Dr. Mee's opinion in formulating the hypothetical given to the
8 vocational expert. ECF No. 17 at 17-19. Sean Mee, Ph.D., a non-examining, State
9 agency psychological consultant filled out a check-box form and a narrative
10 assessment. Tr. 239-41. Using the check-boxes, Dr. Mee indicated that Plaintiff
11 was moderately limited in seven different areas of functioning. Tr. 239-40.
12 However, that portion of Dr. Mee's report does not constitute his opinion. Rather,
13 the narrative is used to elaborate and explain the expert's conclusions. *See* Tr. 241
14 (caption and directions for Section III). The agency has also provided guidance for
15 evaluating medical evidence completed by State agency consultants, including
16 their completion of the mental RFC form such as the one Dr. Mee completed. *See*
17 Program Operations Manual System (POMS), DI 25020.010(B)(1), available at
18 <https://secure.ssa.gov/apps10/poms.nsf/lnx/0425020010>. POMS DI
19 25020.010(B)(1) states:

20 The purpose of section I ("Summary Conclusion") ... is chiefly to
have a worksheet to ensure that the psychiatrist or psychologist has

1 considered each of these pertinent mental activities and the claimant's
 2 or beneficiary's degree of limitation for sustaining these activities
 3 over a normal workday and workweek on an ongoing, appropriate,
 4 and independent basis. **It is the narrative** written by the psychiatrist
 5 or psychologist **in section III** ("Functional Capacity Assessment") ...
 6 **that adjudicators are to use as the assessment of RFC.**

7 (bold in original). Thus, as explained in the agency's Program Operations Manual,
 8 an ALJ properly focuses on the "narrative" portion of the MRFC form, rather
 9 than the "Summary Conclusions" portion. Although POMS "does not have the
 10 force of law," it "is persuasive authority." *Warre v. Commissioner of Social Sec.*
 11 *Admin.*, 439 F.3d 1001, 1005 (9th Cir. 2006).

12 Here the ALJ accepted Dr. Mee's narrative opinions. Tr. 25. Dr. Mee's
 13 findings, as more fully explained by his narrative, were incorporated into the
 14 hypothetical RFC propounded to the vocational expert. No error has been shown.

15 Plaintiff contends the ALJ did not include the Dr. Mee's suggestion that
 16 Plaintiff would do better in work that is not time sensitive. Dr. Mee wrote, "Would
 17 likely do better in work that is not primarily time sensitive (sic)." Tr. 241. Unlike
 18 Dr. Mee's other statements written as definite imperatives, it is the ALJ's
 19 prerogative to reject mere suggestions. *See Carmickle v. Commissioner of Social*
 20 *Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008). That is especially true here,
 where the ALJ observed the consultant's suggestion was quite vague. Tr. 62.

B. Dr. Rodenberger's Opinion

Plaintiff contends Dr. Rodenberger opined that Plaintiff had difficulty

1 maintaining stability of relationships and jobs and since the ALJ did not mention
2 Dr. Rodenberger's opinions at all, his opinion must be credited as a matter of law.
3 ECF No. 17 at 20.

4 The record shows the ALJ specifically considered Dr. Rodenberger's report.
5 The ALJ noted,

6 Furthermore, Comprehensive Mental Health records reflect she is a
7 "rather vague" historian who speculates she might be bipolar with
benign mental status findings. (Ex. 2F/5 [Tr. 201]).

8 Tr. 23. The Court has reviewed Dr. Rodenberger's report and agrees the mental
9 health records show "benign mental status findings." Further, it is clear that Dr.
10 Rodenberger was not expressing his medical opinion when he recounted Plaintiff's
11 subjective complaints, including her complaint that she has difficulty maintaining
12 stability of relationships and jobs. Tr. 201. There is no error here, especially since
13 the ALJ discounted Plaintiff's subjective complaints and that determination was
14 not challenged in her opening brief.

15 **C. The Opinions of Ms. Walker, Ms. Akers, and Ms. Obeid-Campbell**

16 Plaintiff argues that the ALJ improperly rejected the opinion of Ms. Walker
17 and Ms. Akers. ECF No. 17 at 21-22. Ms. Walker assessed a GAF score of 50 on
18 June 26, 2008. Tr. 220. Plaintiff contends the record shows serious abnormalities
19 during the time period of Ms. Walker's treatment, therefore, rejection of Ms.
20 Walker's opinion is insufficient. ECF No. 17 at 21. Plaintiff explains that Ms.

1 Akers evaluation of a GAF score of 49 on January 6, 2010, shows abnormalities as
2 do other provider's opinions during the same time period. ECF No. 17 at 21-22.

3 Ms. Walker and Ms. Akers are nurse practitioners. Nurse practitioners are
4 not "acceptable medical sources" as that term is used in 20 C.R.R. § 404.1513(a),
5 but are considered "other sources" under § 404.1513(d)(1). As the ALJ
6 recognized, other sources are not entitled to the same deference. Tr. 20. The ALJ
7 may discount testimony from these "other sources" if the ALJ gives reasons
8 germane to each witness for doing so. *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th
9 Cir. 2012) (citation and quotations omitted).

10 Here, the ALJ found there were no abnormalities within the brief
11 examinations to support a low GAF rating by Ms. Walker or Ms. Akers. Tr. 20.
12 Further the ALJ found these ratings "questionable" because they were "based
13 entirely upon singular mental health intake evaluations with a two-year gap and the
14 claimant's subjective reports of mental symptomatology." *Id.* The ALJ noted that
15 the treatment records do not corroborate the initial intake GAF scores and the ALJ
16 had discounted claimant's subjective allegations as well. *Id.* In her reply brief,
17 Plaintiff contends Ms. Walker relied upon "a lengthy record" of other mental
18 health reports. ECF No. 24 at 7. Only two reports are mentioned by Ms. Walker;
19 an October 1998 and a May 2007 evaluation. Tr. 219. Since neither of those
20 reports is in the record and they do not directly inform as to Plaintiff's GAF score

1 on the dates she was seen by Ms. Walker and Ms. Akers, the ALJ did not error in
2 rejecting the GAF scores for the reasons stated.

3 Next, the Plaintiff infers the ALJ improperly rejected Ms. Campbell's
4 opinion that Ms. Bixler had at least a moderate impairment in six areas of
5 functioning. ECF No. 17 at 22. The ALJ rejected Ms. Campbell's conclusions
6 because, inter alia, "the marked or severe limitations expressed by the DSHS
7 evaluators are comprised of non-acceptable medical sources espousing opinions
8 inconsistent with persuasive opinion from acceptable medical sources; they are not
9 well supported by medically acceptable clinical findings; inconsistent with the
10 claimant's activities of daily living; are conclusory; and, heavily based upon the
11 self-reports of the claimant." Tr. 24. Plaintiff has not challenged any of the ALJ's
12 reasons for rejecting Ms. Obeid-Campbell's opinion either in her opening or reply
13 brief. No error has been shown.

14 **D. Lay Witness Testimony**

15 Next, Plaintiff contends that the ALJ erred in rejecting the lay witness
16 testimony of Plaintiff's mother, Lisa Bixler. ECF No. 17 at 22-24. The Ninth
17 Circuit summarized the law on lay witness testimony as follows:

18 Lay testimony as to a claimant's symptoms or how an impairment
19 affects the claimant's ability to work is competent evidence that the
20 ALJ must take into account. We have held that competent lay witness
testimony cannot be disregarded without comment and that in order to
discount competent lay witness testimony, the ALJ must give reasons
that are germane to each witness. We have not, however, required the

1 ALJ to discuss every witness's testimony on a[n] individualized,
2 witness-by-witness basis. Rather, if the ALJ gives germane reasons
3 for rejecting testimony by one witness, the ALJ need only point to
4 those reasons when rejecting similar testimony by a different witness.

5 *Molina v. Astrue*, 674 F.3d 1104, 1114 (9th Cir. 2012) (quotations and citations
6 omitted); *see also Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (holding
7 that an ALJ permissibly rejected the claimant's ex-girlfriend's testimony in part
8 because her "close relationship" with the claimant and "desire to help" him
9 influenced her).

10 Contrary to Plaintiff's assertions, the ALJ offered germane reasons for
11 discounting Lisa Bixler's testimony. Significantly, the ALJ stated "overall Lisa
12 Bixler's opinion was analogous to the testimony of the claimant." Tr. 24. The
13 ALJ previously discounted the Plaintiff's subjective complaints. Tr. 23. When lay
14 witness testimony is similar to the claimant's testimony, the ALJ may reject the lay
15 witness testimony for the same reasons used to discount the claimant's testimony.
16 *Valentine v. Commissioner of Social Sec. Admin.*, 574 F.3d 685, 694 (9th Cir.
17 2009). Further, the ALJ afforded some weight to Lisa Bixler's opinion in
18 formulating the residual functional capacity determination. Tr. 24. Plaintiff
19 spends some time in her reply contesting the significance of her own credibility
20 determination, but no reversible, harmful error has been shown.

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1 **ACCORDINGLY, IT IS HEREBY ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment (ECF No. 16) is **DENIED**.

3 2. Defendant's Motion for Summary Judgment (ECF No. 20) is

4 **GRANTED.**

5 3. The hearing on cross motions for summary judgment scheduled for April

6 7, 2014 is **VACATED**.

7 The District Court Executive is hereby directed to file this Order, enter
8 Judgment for Defendant, provide copies to counsel, and **CLOSE** this file.

9 **DATED** September 9, 2013.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge